

SECURITIES ALERT

SEC EXTENDS SECTION 404 COMPLIANCE DEADLINE FOR CERTAIN FOREIGN PRIVATE ISSUERS AND PROPOSES EXTENSION OF SECTION 404 COMPLIANCE DEADLINES FOR SMALLER PUBLIC COMPANIES AND NEW REGISTRANTS



On August 9, 2006, the Securities and Exchange Commission (the SEC) in a final rule release extended the deadline for foreign private issuers that are accelerated filers (but not large accelerated filers) to begin including an auditor attestation report on internal controls in their annual reports. In a companion proposed rule release, the SEC proposed extensions of internal control compliance deadlines for non-accelerated filers and new registrants that would be available to both domestic and foreign private issuers. The SEC is accepting comments on the rule proposals through September 14, 2006. The SEC's rule change and proposals are summarized below, and a table is included at the end of this Alert that compares compliance deadlines before and after giving effect to the SEC's August 9 final and proposed rule releases.

EXTENSION OF AUDITOR ATTESTATION COMPLIANCE DEADLINE FOR CERTAIN FOREIGN PRIVATE ISSUERS

For certain foreign private issuers, the SEC has decided to separate the compliance deadline for the first auditor attestation on internal controls, which is being pushed back, from the compliance deadline for the first management's report on internal controls, which has not changed. More specifically, foreign private issuers that are accelerated filers (i.e., companies with an aggregate worldwide public float of at least \$75 million but less than \$700 million) will continue to be required to include a management's report on internal controls in their Form 20-F or 40-F annual reports filed for their fiscal year ending on or after July 15, 2006; however, the SEC has extended the deadline for such companies to provide an auditor's attestation report on internal controls in their Form 20-F or 40-F annual reports until fiscal years ending on or after July 15, 2007. In other words, foreign private issuers that are accelerated filers would be required to include a management's report — but not an auditor attestation — in their first year of compliance with the requirements of Section 404 of the Sarbanes-Oxley Act of 2002. This relief is not available to foreign private issuers that are large accelerated filers (i.e., companies with an aggregate worldwide public float of \$700 million or more).

PROPOSED EXTENSION OF SECTION 404 COMPLIANCE DEADLINES FOR SMALLER PUBLIC COMPANIES

The SEC is proposing to separate and push back the compliance deadlines for non-accelerated filers to provide their first auditor attestation on internal controls and their first management's report on internal controls. In particular, the SEC proposes to delay by five months the date by which non-accelerated filers (i.e., companies with an aggregate worldwide public float of less than \$75 million) must start providing a management's report on internal controls in their annual reports, from their first fiscal years ending on or after July 15, 2007, until their first fiscal years ending on or after December 15, 2007. The SEC states in the release that this deadline could be further postponed if the SEC has not issued further guidance for management on the assessment of internal controls, which the SEC previously announced it would issue, in time to be of assistance in connection with annual reports for fiscal years ending on or after December 15, 2007. The SEC also proposes to extend by 17 months the date by which non-accelerated filers must begin to include an auditor's attestation report on internal controls in their annual reports, until their first fiscal years ending on or after December 15, 2008. The SEC states in the release that this deadline could be further postponed if revisions to Auditing Standard No. 2 contemplated by the Public Company Accounting Oversight Board have not been finalized in time to be of assistance in connection with annual reports for fiscal years ending on or after December 15, 2008.

To lessen the concern that the first management's report would be subject to more second-guessing as a result of the proposed separation of the first management's report and the first auditor attestation, the SEC proposes to deem the first management's report for non-accelerated filers to be "furnished" rather than "filed." The SEC indicates that if it adopts such proposal, it intends to afford similar relief to foreign private issuers that are accelerated filers (but not large accelerated filers) that similarly will file only management's report during their first year of compliance with Section 404 requirements.

PROPOSED TRANSITION RELIEF FOR NEWLY PUBLIC COMPANIES

In the same release in which the SEC proposes an extension of the Section 404 compliance deadlines for non-accelerated filers, the SEC also proposes to amend its rules so that a company would not be required to provide either a management's report or an auditor attestation report on internal controls until it has previously filed one annual report with the SEC. New registrants could continue to take advantage of any later compliance deadline applicable with respect to specific categories of issuers.

CEO AND CFO SECTION 302 CERTIFICATIONS

In the case of the bifurcated Section 404 compliance deadlines with respect to management's reports and auditor attestations for both non-accelerated filers and foreign private issuers that are accelerated filers, complete CEO and CFO Section 302 certifications would be required, including the references to the officers' responsibility for establishing and maintaining internal controls, with the first annual report to include a management's report on internal controls.

SECTION 404 COMPLIANCE DEADLINES

The following table compares Section 404 compliance deadlines for domestic filers and foreign private issuers (FPIs) before and after giving effect to the SEC's August 9 final and proposed rule releases.

Category of Filer	Compliance Deadlines Before August 9 SEC Releases (Starting with annual reports for fiscal years ending on or after the dates below)		New and Proposed Compliance Deadlines (Starting with annual reports for fiscal years ending on or after the dates below)	
	Management's Report	Auditor Attestation	Management's Report	Auditor Attestation
Non-Accelerated Filer (public float of less than \$75 million)	Domestic: 15-July-07 FPI: 15-July-07	Domestic: 15-July-07 FPI: 15-July-07	PROPOSED Domestic: 15-Dec-07 FPI: 15-Dec-07	PROPOSED Domestic: 15-Dec-08 FPI: 15-Dec-08
Accelerated Filer (public float of at least \$75 million but less than \$700 million)	Domestic: Already required FPI: 15-Jul-06	Domestic: Already required FPI: 15-Jul-06	NO CHANGE	Domestic: NO CHANGE NEW FPI: 15-Jul-07
Large Accelerated Filer (public float of \$700 million or more)	Domestic: Already required FPI: 15-Jul-06	Domestic: Already required FPI: 15-Jul-06	NO CHANGE	NO CHANGE

CONTACT INFORMATION

If you have questions or would like to learn more about this topic, please contact the partner who represents you, or:

Ambika Kuckreja
akuckreja@akingump.com
1.866.AKIN LAW

Austin Brussels Dallas Dubai Houston London Los Angeles Moscow
New York Philadelphia San Antonio San Francisco Silicon Valley Taipei Washington, D.C.